(2) Supreme Court, U.S.
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OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

CHARLES ROY RAMBO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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36 pp

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FILED
Jan 25 1996
Cathy A. Catterson, Clerk
U.S. Court of Appeals

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States Of America,	)	No. 94-30426
	)	
Plaintiff-Appellee,	)	D.C. No. CR
	)	94-0017-1-JDS
v.	)	
	)	
Charles Roy Rambo,	)	OPINION
	)	
Defendant-Appellant.	)	

Appeal from the United States District Court
for the District of Montana
Jack D. Shanstrom, District Judge, Presiding

Submitted November 3, 1995*
Seattle, Washington

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*The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Filed January 25, 1996

Before: Wright, Beezer and Hawkins, Circuit Judges.

Opinion by Judge Beezer

BEEZER, Circuit Judge:

Charles Roy Rambo appeals his convictions of one count each of unlawful possession of a firearm and possession of an unregistered silencer. 18 U.S.C. § 922(o); 26 U.S.C. §§ 5841, 5861(d), 5871. He challenges his conviction for unlawful possession of a firearm on the ground that 18 U.S.C § 922(o) is unconstitutional. He also argues that the district court erred in denying his motions: (1) to suppress evidence discovered during a search; (2) to suppress statements made by Rambo to the police; (3) to dismiss the indictment because of government misconduct violating his right to due process of law; and (4) for a judgment of acquittal. Finally, he contends that the district court erred in admitting evidence of the serial number of the firearm.

We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I

Rambo first argues that his conviction for

unlawful possession of a firearm should be reversed because 18 U.S.C. § 922(o) is unconstitutional. Rambo contends that section 922(o) exceeds the authority granted to Congress under the Commerce Clause. We review de novo the constitutionality of a statute. United States v. Sahhar, 56 F.3d 1026, 1028 (9th Cir.), cert. denied, 116 S. Ct. 400 (1995). We hold that section 922(o) is a proper exercise of the authority granted to Congress under the Commerce Clause.

Section 922(o) states:

> (1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.
>
> (2) This subsection does not apply with respect to --
>
> (A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or
>
> (B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

We review section 922(o) in light of the Supreme Court's recent decision in United States v. Lopez, 115 S. Ct. 1624 (1995). In Lopez, the Supreme Court held that the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q), is beyond the scope of the authority granted Congress by the Commerce Clause, and is thus unconstitutional. Section 922(q) made it unlawful "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."

In reviewing the constitutionality of section 922(q), the Supreme Court explained that there are three categories of activity that Congress can regulate or protect under the Commerce Clause: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities having a substantial relation to interstate commerce." Id. at 1629-30. Section 922(q) does not fall within any of these categories.

The Court first determined that section 922(q) does not fall within the first two categories because it does not regulate the channels of interstate commerce nor does it protect an instrumentality of interstate commerce. The Court then examined the section under the third category. The Court held that section 922(q) "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might

define those terms." Id. at 1630-31. "[P]ossession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." Id. at 1634. Thus, because section 922(q) does not regulate an activity that substantially affects interstate commerce, the Court held that section 922(q) is unconstitutional under the Commerce Clause.

Although Lopez is instructive, it does not control our analysis of section 922(o). We agree with the Fifth and Tenth Circuits that section 922(o) represents a permissible exercise of the authority granted to Congress under the Commerce Clause. United States v. Kirk, 70 F.3d 791 (5th Cir. 1995); United States v. Wilks, 58 F.3d 1518 (10th Cir. 1995).

Section 922(o) prohibits the possession or transfer of machineguns only if they were not lawfully possessed before May 19, 1986. In other words, there can be "no unlawful possession under section 922(o) without an unlawful transfer." Kirk, 70 F.3d at 796. Regulating this category of possession, therefore, regulates commerce. "In effect, the ban on such possession is an attempt to control the interstate market for machineguns by creating criminal liability for those who would constitute the demand-side of the market, i.e., those who would facilitate illegal transfer out of the desire to acquire mere possession." Id.

Unlike section 922(q), section 922(o) comes

within the first category enumerated by the Supreme Court in Lopez. Id. Section 922(o) is "a regulation of the use of the channels of interstate commerce" because it is "an attempt to prohibit the interstate transportation of a commodity through the channels of commerce." Lopez, 115 S. Ct. at 1630. By regulating the market in machineguns, including regulating intrastate machinegun possession, Congress has effectively regulated the interstate trafficking in machineguns. "[T]here is a rational basis to conclude that federal regulation of intrastate incidents of transfer and possession is essential to effective control of the interstate incidents of such traffic." Kirk, 70 F.3d at 797.

The prohibition of possession under section 922(o) differs greatly from the prohibition in section 922(q). Section 922(q) did not regulate the market in weapons, and instead regulated merely the possession of a weapon in a specific geographic area. Section 922(o), on the other hand, prohibits the possession of all machineguns illegally transferred. Section 922(o) regulates the use of the channels of interstate commerce. Therefore, we join the Fifth and Tenth Circuits in holding that section 922(o) is a proper exercise of the authority granted to Congress under the Commerce Clause.

II

Rambo next argues that the district court erred in

A

denying his motion to suppress the firearm and silencer that were the subjects of his convictions. Rambo contends that he had a legitimate expectation of privacy in the black canvas bag containing the two items at issue, and that Deputy Sheriff William Graf improperly opened the bag without a search warrant. We disagree.

We review de novo the validity of a warrantless search. United States v. Ogbuehi, 18 F.3d 807, 812 (9th Cir. 1994).

No one disputes what occurred during the search, the only disagreement is over whether it was an illegal search and seizure. On February 25, 1993, Deputy Graf received a call regarding a burglary at Rambo's residence. When Graf arrived, he spoke to Jim Morgan, Rambo's brother-in-law, who observed the flight of the burglar. Morgan told Graf that the burglar was carrying two VCRs and a black canvas bag. Graf conducted an investigation at the scene of the crime and discovered an empty drawer lying on the floor with a few items of jewelry scattered nearby; he deduced that items of jewelry were also taken by the burglar.

The burglar did not get far with his loot. Based on information provided by Morgan to the police, a car driven by William Henman was stopped by a highway patrol officer near Billings. Henman and his vehicle were taken to the Yellowstone County Sheriff's Office where Morgan positively identified Henman as the burglar. After obtaining the consent of Henman's parole

officer, Deputy Graf searched Henman's vehicle.[1] He found two VCRs and a black canvas bag. Graf searched the partially unzipped canvas bag, where he discovered the stolen jewelry along with a .45 caliber pistol and a silencer.

The district court determined that Rambo had no legitimate expectation of privacy in the bag after it was stolen and, even if he did, the search of the bag was reasonable under the Fourth Amendment. On appeal, the United States does not argue that Rambo lacked a legitimate expectation of privacy in the bag. Notwithstanding that concession, the United States still contends that the search was constitutional. Rambo, of course, did not consent to the search of his bag, so we must determine whether Deputy Graf's search of constitutionally protected property was reasonable.

The Fourth Amendment proscribes unreasonable searches. As a general rule, searches conducted without a warrant and probable cause are presumptively unreasonable, subject to a number of "specifically established and well-delineated" exceptions. Katz v.

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[1] Rambo does not dispute the legality of Deputy Graf's search of the vehicle. This is unsurprising, as a probation and parole officer is vested with authority to consent to a search of a parolee's vehicle. State v. Burke, 766 P.2d 254, 257 (Mont. 1988). In any case, it is doubtful that Rambo has standing to object to the search of Henman's property.

United States, 389 U.S. 347, 357 (1967). But see United States v. Barona, 56 F.3d 1087, 1092 n.1 (9th Cir. 1995) ("[r]easonableness, not probable cause, is undoubtedly the touchstone of the Fourth Amendment."). One such exception is the so-called automobile exception. California v. Acevedo, 500 U.S. 565, 566 (1991). Under this doctrine, as developed by the Supreme Court in United States v. Ross, 456 U.S. 798 (1982) and Acevedo, "[t]he police may search an automobile and the containers within it [without a warrant] where they have probable cause to believe contraband or evidence is contained." 500 U.S. at 580.

Deputy Graf's concededly proper search of Henman's vehicle revealed the presence of stolen property including Rambo's VCRs and black canvas bag. Deputy Graf had ample probable cause to believe that the missing jewelry might be in the bag. Under Acevedo, it was completely reasonable for Graf to search the bag to look for the jewelry; indeed he found the jewelry there. No warrant or consent was required. Once Graf had legitimately searched the bag, the seizure of the firearm and silencer was justified under the plain view doctrine. See Horton v. California, 496 U.S. 128, 133-34 (1990).[2]

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[2] Because we conclude that the search of the bag and seizure of the firearm and silencer were reasonable under the automobile exception and plain view doctrine, we need not address the United States' alternative contention that the search of the bag was justified as an

Rambo's reliance on our decision in United State v. Welch, 4 F.3d 761 (9th Cir. 1993) is misplaced. In Welch, we concluded that one occupant of a vehicle did not have actual authority to consent to a search of another party's property, and that a reasonable officer would not have concluded that the occupant had apparent authority to consent to the search. Deputy Graf did not rely on the Probation Officer's consent to search Rambo's bag. Rather, it was the existence of probable cause that justified the search of the bag. Welch does not apply.

III

Rambo next argues that the district court erred in denying his motion to suppress statements he made in a telephone call to Musselshell County Sheriff Paul Smith soon after the discovery of the firearm and silencer. Rambo contends that Sheriff Smith assured him that he could speak off the record, or at least failed to make clear that the conversation was not off the record, and thus his statements should be deemed involuntary.[3] We disagree. We review for clear error the district court's factual findings regarding the voluntariness of a defendant's statement, but we review

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inventory search.

[3] Rambo does not argue that he was subjected to custodial interrogation.

de novo the district court's ultimate conclusion that a statement was made voluntarily. Arizona v. Fulminante, 499 U.S. 279, 287 (1991); United States v. Wolf, 813 F.2d 970, 974 (9th Cir. 1987).

The district court heard inconsistent testimony from Rambo and Sheriff Smith regarding what Smith told Rambo. The court's finding that Smith was the more credible witness was not clearly erroneous. Smith testified that Rambo initiated the telephone conversation and asked if the two could "talk . . . in confidence." Smith responded that "it depended on what it [the conversation] was about." Rambo proceeded to make several incriminating statements regarding his knowledge of the illegal nature of his firearm.

Rambo's statements to Sheriff Smith were not coerced. No promise of confidentiality or offer of immunity induced Rambo to discuss the illegal nature of the firearm. Sheriff Smith's statement to Rambo merely indicated that he might treat the conversation as confidential. Rambo proceeded at his own risk. Applying the totality of the circumstances test, Fulminante, 499 U.S. at 284-86, we have no difficulty determining that Rambo acted voluntarily when he spoke to Sheriff Smith. The district court committed no error in allowing Rambo's statements to be introduced into

evidence.[4]

IV

Rambo next contends that the district court erred by denying his motion to dismiss both counts of the indictment because of alleged government misconduct. He argues that members of the Musselshell County Sheriff's Department destroyed potentially exculpatory evidence in bad faith when they fired multiple rounds using Rambo's firearm and silencer while conducting test firing. We review this issue de novo, United States v. Restrepo, 930 F.2d 705, 712 (9th Cir. 1991), and we agree with the district court.

Unless a criminal defendant can demonstrate "bad faith on the part of the police," the failure of the police to preserve "potentially useful evidence" does not constitute a denial of due process of law. Arizona v. Youngblood, 488 U.S. 51, 58 (1988). Rambo provided no evidence of bad faith on the part of the deputies. Agent Flickinger of the Bureau of Alcohol, Tobacco & Firearms instructed the Sheriff's Office personnel to test fire the firearm in order to determine if it was fully automatic. Although the deputies fired more rounds

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[4] Because we have already concluded that the search of Rambo's bag was reasonable, we must necessarily reject Rambo's contention that the statements were inadmissible as a "fruit" of prior illegality. See Wong Sun v. United States, 371 U.S. 471 (1963).

than were necessary, that indicates only poor judgment, not bad faith. The deputies' use of the silencer, which was contrary to their instructions, was equally devoid of bad faith.

Rambo argues that the firearm and silencer, if they had not been fired, might have revealed the absence of fingerprints. This possibility, however, is irrelevant in light of the lack of a showing of bad faith. Also irrelevant is Rambo's contention that the firearm and silencer might have revealed that they had never been fired, negating the requirement that Rambo knew that the firearm was fully automatic and that the silencer functioned. A government expert testified, however, that a person could know the nature of the firearm and silencer without firing them.

V

Rambo next argues that the district court erred in denying his motion for a judgment of acquittal as to both counts. This argument is without merit.

We review a motion for judgment of acquittal under the same standard applied to a challenge to the sufficiency of the evidence. United States v. Mullins, 992 F.2d 1742, 1478 (9th Cir.) cert. denied, 113 S. Ct. 2997, 114 S. Ct. 556 (1993). Sufficient evidence exists to support a conviction if "reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of

the crime beyond a reasonable doubt." United States v. Bishop, 959 F.2d 820, 829 (9th Cir. 1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

Rambo first argues that the government presented insufficient evidence that he knowingly possessed the fully automatic firearm and unregistered silencer on February 25, 1993. He is wrong. The burglar, Henman, testified that he removed the black canvas bag from Rambo's house on the day in question. Rambo's brother-in-law, Morgan, saw Henman carrying the bag out of the house. When Henman was apprehended a short time later, the firearm and silencer were found in the only black canvas bag located in the automobile. The bag also contained Rambo's jewelry. Finally, Rambo expressed concern to Sheriff Smith about the illegal weapon contained in the canvas bag. This evidence was more than sufficient to allow a rational trier of fact to find that Rambo knowingly possessed the firearm and silencer.

Rambo also contends that the government presented insufficient evidence regarding whether he knew the real nature of the silencer. In order for a defendant to be convicted of possession of an unregistered silencer, the defendant must know that the particular item was in fact a silencer. See Staples v. United States, 114 S. Ct. 1793, 1802 (1994). The government's expert witness testified that the design of a silencer is sufficient to make someone aware of its nature; proof of actual use is not required. A rational

trier of fact could draw the conclusion from the evidence that Rambo must have known that the item at issue was a silencer.

VI

Lastly, Rambo argues that the district court erred in denying his motion in limine to exclude evidence relating to the partially obliterated serial number on the firearm. We review a district court's denial of a motion in limine for abuse of discretion. United States v. Wallace, 848 F.2d 1464, 1472 (9th Cir. 1988).

Although the government had initially charged Rambo with possession of a firearm with partially obliterated serial number, it successfully moved to dismiss that count prior to trial. Nevertheless, evidence of the serial number was introduced at trial in two respects. First, the firearm was introduced into evidence and the partially obliterated number was, of necessity, visible to the jury. Second, the United States attempted to negate Rambo's argument that he was attempting to register the firearm, and had purchased the weapon from a now deceased dealer who had failed to give Rambo the appropriate paperwork. The obliterated serial number was evidence that Rambo's story was false; he could not have purchased the gun legitimately.

We perceive no abuse of discretion. The admission of the firearm into evidence was obviously essential to the government's case. Furthermore, the

government is correct that the obliterated serial number made the jury more likely to disbelieve Rambo's testimony about how he acquired the firearm. See Fed. R. Evid. 401 ("[r]elevant evidence" is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable . . . than it would be without the evidence.").

AFFIRMED.

Counsel Listing

Jay F. Lansing, Moses Law Firm, Billings, Montana, for defendant-appellant.

C. Ed Laws, Assistant United States Attorney, Billings, Montana, for plaintiff-appellee.

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INTERNAL USE ONLY: Proceedings include all events.
94-30426 USA v. Rambo

United States of America
Plaintiff - Appellee

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v.

Charles Roy Rambo
Defendant - Appellant

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FILED
94 Aug 29 AM 8:30
Lou Aleksich, Jr., Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

United States Of America,	)	No. CR 94-
	)	0017-1-JDS
Plaintiff,	)	
	)	**Order And**
v.	)	**Memorandum**
	)	**On Pretrial**
Charles Roy Rambo,	)	**Motions**
	)	
Defendant	)	

I. PROCEDURAL BACKGROUND

It has been stipulated between counsel for the parties that the Court may decide the pretrial motions presently pending before the court upon the testimony and exhibits presented at the hearing on November 29, 1993 in CR 93-42-BLG-JDS, **United States v. William Gregory Henmen [sic], and Charles Roy Rambo**. That case was dismissed without prejudice upon motion by the government. The Court has ordered a transcript of the hearing on CR 93-42-BLG-JDS and reviewed it.

Presently pending before the court are the following motions:

1. Motion for Discovery;

2. Motion to Suppress all items contained within the black bag seized by law enforcement on February 25, 1993;

3. Motion to Suppress alleged statements made by defendant to law enforcement on February 25, 1993.

4. Motion to Dismiss due to multiplicity;

5. Motion to Dismiss on the grounds that the Government destroyed evidence;

6. Motion to Dismiss for outrageous government conduct.

These motions were before the court in CR 93-42-BLG-JDS. Upon review of the present motions and those filed in CR 93-42-JDS-BLG I find that the motions to dismiss for destruction of evidence and for government misconduct are denied without further opinion than what was issued by the court in its Memoranda and Order in CR-93-42-BLG-JDS. The parties should refer to that Memoranda and Order.

Defendant's motion for discovery was not addressed in the CR-93-42-BLG-JDS Memoranda and Order. That motion is granted as far as it pertains to discloseable evidence under **Rule 16, F.R.Cr.P.** It appears the government has appropriately disclosed under its statutory obligations.

Defendant's motion to suppress statements he made to Musselshell County Sheriff, Paul Smith was addressed in the CR 93-41-BLG-JDS [sic] Memoranda and Order, and will also be discussed briefly here. Defendant's motion to suppress evidence was addressed in that Memoranda and Order but defendant argues that subsequent case law invalidates the search and seizure of the firearms at issue in this case.

Defendant's motion to dismiss due to multiplicity was addressed in the CR 93-42-BLG-JDS Memoranda and Order. Because the indictment in this action differs from that in CR 93-42-BLG-JDS, however, I will also discuss that motion here. Therefore, I will address defendant's motions to suppress statements and the firearms along with his motion to dismiss for multiplicity.

II. DISCUSSION.

Motion to Suppress Statements.

The gist of defendant's renewed motion to

suppress statements in this case is two-fold. First he contends it is unreasonable that Rambo would have proceeded to make incriminating statements to the effect that he possessed an illegal machinegun when Sheriff Smith had given him no assurance that his statements would be considered "off the record" or held confidential. On the contrary, at the suppression hearing defendant testified Sheriff Smith told him that he could speak to him "off the record" before going ahead and indicating to Smith that one of the things taken from his home was an illegal weapon.

Obviously, there is a conflict in the testimony of defendant and Smith about whether assurances were given defendant before he proceeded to talk. Sheriff Smith testified that he told defendant in response to defendant's question of whether the conversation could be kept confidential, that it depended on what it was about. Smith testified that at that point, defendant did not ask for further assurances and the conversation proceeded. In effect defendant is requesting the court to find Sheriff Smith not credible in his testimony. I can not do so. Just because it appears unwise for defendant to have spoken to Smith on basically no assurances, that does not mean it didn't happen.

Secondly, defendant asserts that once he asked Smith if he could speak "off the record", all questioning and conversation should have ended or a **Miranda** warning should have been give [sic]. I don't agree. The evidence at the suppression hearing was that

defendant was in no way in custody during this phone conversation with Smith. Indeed, defendant's wife initiated the phone call. The protections of **Miranda** were not triggered by this non-custodial conversation.

Motion to Dismiss Due To Multiplicity.

Defendant is charged with three counts in this indictment. The first charges him with possession of an illegal weapon--a machinegun in violation of **18 U.S.C. 922(o)(1)**. The second charges him with possession an unregistered firearm--a silencer, in violation of **26 U.S.C. 5841, 5861(d), and 5871**. The third charges him with a firearm having an altered serial number in violation of **26 U.S.C. 5861(h) and 5871**.

"Two or more offenses may be charged in the same indictment . . . in a separate count for each offense if the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." **Fed.R.Crim.P. 8(a)**.

A single transaction may violate different laws and expose a defendant to conviction for two or more offenses. **United States v. Barnett**, 418 F.2d 309 (6th Cir. 1969). Here, all three counts are clearly separate crimes. Each could be a single charge in three separate indictments, but **Rule 8(a)** allows joinder to promote judicial economy. This indictment is not multiplicitous.

Motion To Suppress Evidence.

Defendant renews his challenge made in CR 93-42-BLG-JDS to the search of his black canvas bag which was inside of the burglar, William Henman's vehicle. The machinegun and silencer, which caused this indictment to be brought were, of course, located within the canvas bag. Defendant points to **United States v. Infante-Ruiz**, 13 F.3d 498 (1st Cir. 1994) and **United States v. Khoury**, 901 F.2d 948 (11th Cir. 1990) as authority in addition to **United States v. Welch**, 4 F.3d 761, (9th Cir. 1993) and **United States v. Gooch**, 6 F.3d 673 (9th Cir. 1993) which he had previously brought to the court's attention.

The core of defendant's challenge is that although Deputy Graf had authority from Henman's parole officer to conduct a search of Henman's vehicle, that authority did not extend to the property of defendant. The government's position is that the opening of the black bag by Graf was not unreasonable and, under the circumstances, dictated by his investigation into the burglary of defendant's home.

In **United States v. Welch**, 4 F.3d 761 (9th Cir. 1993), Welch and his codefendant came under suspicion for passing counterfeit bills while gambling at a hotel. Security officers interviewed the codefendant separately, found some bills in his bag and obtained consent from him to search the rented vehicle which he

and Welch were using. The officers found Welch's purse in the truck, opened it and found counterfeit bills. The 4th amendment issue was whether the codefendant's consent to search the vehicle authorized the search of Welch's purse. The Ninth Circuit said no because there was no indication that codefendant had use of, joint access or control over Welch's purse. Further, nothing indicated that Welch authorized codefendant to give consent to a search of her purse. Id. at 764.

In United States v. Khoury, 901 F.2d 948 (11th Cir. 1990) a DEA agent was conducting an inventory search of defendant's car after he was arrested. The agent removed a closed briefcase and inspected its contents, including defendant's notebook. The issue was whether a second inspection of the notebook, after the agent had ascertained nothing of value was secreted between the pages, violated the restrictions on an inventory search. The court found that it did because the subsequent search was to search for evidence and exceeded the purpose of the inventory search. Id. at 957-960.

In United States v. Infante-Ruiz, 13 F.3d 498 (1st Cir. 1994), officers were looking at arrest defendant on narcotics charges and were following his rented vehicle. After stopping the car the officer secured consent from the driver to search the car. He also searched the trunk without objection from the driver. The officer proceeded to open an unlocked briefcase in the trunk belonging to defendant and discovered a

loaded gun. The search was not upheld as there were no grounds which overcame defendant's privacy interest ie. there was insufficient probable cause, no inevitable discovery and no consent.

Here, there was a parole search of an alleged burglar's vehicle for the stated purpose of obtaining evidence of the burglary. Deputy Graf had been informed earlier by Mr. Morgan, who was living on defendant's premises, that he had seen the burglar coming out of the house with 2 VCR's and a black canvas bag. A search of the vehicle resulted in deputies Graf and Thomas finding these articles. The contents of the black bag were not visible. Defendant challenges deputy Graf's inspection of the bag which he knew belonged to defendant. The inspection uncovered the illegal firearms at issue in this case.

Under Montana law a search of parolee or probationer's vehicle, authorized by his parole officer, is proper if there is reasonable cause to do so. **State v. Burke**, 766 P.2d 254 (Mont. 1988). Certainly, there was reasonable cause for the parole search of the burglar's vehicle. If police have probable cause to believe that either a vehicle or a container within a vehicle contains contraband, evidence of crime, or other matter that may be lawfully be seized, no Fourth Amendment violation occurs when the police open and search the container without a warrant. **United States v. Ross**, 456 U.S. 798 (1982). I find that in the context of this parole search under reasonable cause, it

was proper for the officers, here, to open the black canvas bag to determine if it contained evidence of the burglary.

The issue now is whether the contents of the bag can be used against not the burglar (Henman), but the victim of the crime--defendant, because they contained articles which gave cause for an indictment against him. Although there is no evidence that defendant abandoned the bag or its contents, and therefore, gave up ownership for standing purposes, there is doubt as to whether, under these circumstances, defendant has a reasonable expectation of privacy in the bag. In this sense the unusual fact pattern here differs significantly from the cases defendant cites in support of his motion to suppress. Certainly, a person who has a container stolen has to expect that upon finding the container, law enforcement may inspect and have authority to inspect its contents to determine the evidence of the theft. This is an expected and not an unreasonable search. This then is a case where although defendant has not abdicated his ownership, the circumstances cannot give rise to his having a reasonable expectation of privacy in the contents of the gag [sic].

Accordingly,

IT IS ORDERED:

1. That defendant's motion for discovery is granted as far as it pertains to discloseable evidence

under **Rule 16, F.R.Cr.P.**;

2. Defendant's motions to suppress statements and evidence are denied;

3. Defendant's motions to dismiss on the grounds of multiplicity, government misconduct and destruction of evidence are denied.

The Clerk of Court is directed to forthwith notify the parties of the making of this order.

DONE and **DATED** this 29th day of August, 1994.

s/ Jack D. Shanstrom
United States District Judge

FILED
Mar 8 1996
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States Of America,	)	No. 94-30426
	)	
Plaintiff-Appellee,	)	D.C. No. CR
	)	94-0017-1-JDS
v.	)	
	)	ORDER
Charles Roy Rambo,	)	
	)	
Defendant-Appellant.	)	

Before: Wright, Beezer and Hawkins, Circuit Judges

The panel has voted unanimously to deny the petition for rehearing. Judges Beezer and Hawkins vote to reject the suggestion for rehearing en banc and Judge Wright so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc. Fed.

R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

MAR 18 1996
MANDATE ISSUED

FILED
Mar 21 1996
LOU ALEKSICH, JR., Clerk

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 94-30426
CT/AG#: CR-94-00017-1-JDS

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

CHARLES ROY RAMBO

Defendant - Appellant

APPEAL FROM the United States District Court for the District of Montana (Billings).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana (Billings) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered January 25, 1996

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

MAR 18 1996

FILED
Mar 17 1994
Lou Aleksich, Jr., Clerk
By Marietta M. Rudio, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

United States Of America,	)	No. CR 94-17-BLG-JDS
Plaintiff,	)	CT I: 18 U.S.C. §922(o)(1)
v.	)	CT II: 26 U.S.C. §5841 5861(d), 5871
Charles Roy Rambo,	)	CT III: 26 U.S.C. §5861(h) & 5871
Defendant	)	Penalty: $250,000 fine and/or 10 years on each count

INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

On or about the 25th day of February, 1993, in the State and District of Montana, the defendant, CHARLES ROY RAMBO, knowingly possessed a

firearm, to wit: a RPB Industries, Model SAP M-10, .45 caliber machinegun, with a partially obliterated serial number (81-000____), in violation of Title 18, United States Code, Section 922(l)(1).

COUNT II

On or about the 25th day of February, 1993, in the State and District of Montana, the defendant, CHARLES ROY RAMBO, knowingly possessed a firearm, to wit: a silencer, not registered to him in the National Firearms Registration and Transfer Record, in violation of Title 26, United States Code, Section 5841, 5861(d), and 5871.

COUNT III

On or about the 25th day of February, 1993, in the State and District of Montana, the defendant, CHARLES ROY RAMBO, knowingly possessed a firearm having the serial number or other identification required by law obliterated, removed, changed, and altered, that is, a RPB Industries, Model SAPM-10, .45 caliber with a partial serial number reading 81-000___, in violation of 26 United States Code, Section 5861(h) and 5871.

A TRUE BILL.

s/ Foreperson

s/ Sherry Scheel Matteucci
United States Attorney